IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35438

FREDERICK MANAGEMENT COMPANY, LLC,
Plaintiff Below, Appellant

v.

CITY NATIONAL BANK OF WEST VIRGINIA,
A National Banking Association,
Defendant Below, Appellee

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

HONORABLE F. JANE HUSTEAD, JUDGE
CIRCUIT COURT OF CABELL COUNTY
CIVIL ACTION NO. 04-C-323

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I. INTRODUCTION

This is the brief of the Appellee, City National Bank of West Virginia ("City"), in an appeal filed by the Appellant, Frederick Management Company, LLC ("St. James")[1] from an Order entered on March 23, 2009, by the Honorable F. Jane Hustead, Judge of the Circuit Court of Cabell County, granting summary judgment to City on St. James' breach of contract claim. Judge Hustead correctly awarded summary judgment because there was no evidence presented that would have allowed St. James to prevail under its sole claim for breach of contract. Rather, the only evidence presented demonstrated City's entitlement to judgment as a matter of law.

The resolution of St. James' "breach of contract" claim was quite simple. Because St. James admittedly failed to timely prepare a lease termination agreement ("LTA"), its execution came too late to terminate a sublease between City and the law firm of Frazier & Oxley and, thus, City could not, as a matter of law, surrender the premises subleased to Frazier & Oxley.

A tenant cannot breach a contract to surrender what it cannot surrender as a matter of law at the time the contract is executed. Here, had St. James simply prepared, presented, and executed the LTA in accordance with the terms of its lease, the sublease would have been terminated, and St. James could have evicted Frazier & Oxley. Instead, by the time it presented the LTA to City, it was too late to effectuate a termination of Frazier & Oxley.

City could no more be held liable for breach of the LTA by its failure to evict Frazier & Oxley than St. James could have evicted Frazier & Oxley on the date the LTA was executed. St. James had represented to City, prior to execution of the LTA, it would resolve any issues with

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[1] The Appellant was referred to throughout the course of this litigation as St. James. All the relevant documents reference St. James. Although the St. James' complaint was amended near the very end of litigation to reflect the successor corporation to St. James, the Circuit Court referenced the Appellant as St. James in its summary judgment order to avoid any confusion. Accordingly, City's brief will continue to refer to the Appellant as "St. James."

respect to the tenancy of Frazier & Oxley, and City was entitled to rely on that representation. Thus, Judge Hustead correctly determined that there was no evidence upon which St. James could prevail in its breach of contract action against City.

Initially, St. James attempted to avoid the consequences of its own dilatory conduct by suing Frazier & Oxley and arguing that the law of surrender did not apply. When that failed, St. James sued City for fraudulently concealing the sublease, which it later withdrew as City had no duty to disclose the sublease[2] and the claim was otherwise barred by the statute of limitations.[3] Thereafter, St. James prosecuted a claim against City for "breach of contract," attempting to relitigate the surrender issue, arguing that City breached the LTA by failing to surrender what it could not surrender, i.e., the subleased premises. Alternatively, St. James argued that there had been a "mutual mistake of fact" or a "mutual mistake of law" and that the lease termination

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[2] Because St. James was admittedly aware of the occupancy of Frazier & Oxley in the mezzanine, it was St. James' duty, not City's, to inquire into the basis of Frazier & Oxley's tenancy. See 49 Am. Jur. 2d *Landlord and Tenant* § 540 (1995)("It is a general rule of law that the possession of land is notice to the world of every legal or equitable right that the possessor has therein. It is generally held that the possession of a tenant is notice to a purchaser of the reversion of the actual interest of the tenant. Thus, persons dealing with an owner of land for purposes of sale or purchase who have knowledge of possession by a lessee are placed on inquiry as to the full terms and condition of the lease, and a purchaser of real property takes on constructive notice of the lessee's rights so long as the lessee is in open possession of the property. Similarly, it has been held that the actual possession of the premises by the lessee's assignee at the time of the sale of the reversion is notice to the purchaser of the assignee's interest under the assignment."); 49 Am. Jur. 2d *Landlord and Tenant* § 914 (1995)("A purchaser is given constructive notice of rights of a landlord by possession of land by a tenant and when a purchaser fails to make any inquiry of the tenant as to the source of his or her title since, had inquiry been made, the tenant would naturally have referred the purchaser to the landlord, from whom the purchaser could have learned the nature and character of the landlord's rights.")(footnote omitted). Consequently, St. James eventually withdrew its fraudulent concealment claim.

[3] St. James admittedly took more than one year after it learned of the sublease to sue City for fraudulent concealment; thus, its claim was barred by the statute of limitations, which is another reason it eventually withdrew its fraudulent concealment claim.

agreement should be set aside. Unfortunately for St. James, the undisputed evidence supported neither a breach of contract claim or, in the alternative, a "mutual mistake of fact" or "mutual mistake of law" claim.

It was undisputed in the evidence presented to Judge Hustead that (1) neither St. James nor City ever discussed the sublease, discussed whether the space occupied by Frazier & Oxley would be turned over as a result of the LTA, or contemplated the issue of surrender; (2) St. James represented to City, prior to execution of the LTA, that it would deal with Frazier & Oxley after execution of the LTA; (3) it was solely St. James' failure to have the LTA executed in a timely fashion that gave rise to the issue of surrender; and (4) even if, as St. James alleged, the parties intended for the LTA to terminate the sublease, this Court and Judge Pancake already held that neither St. James nor City had any right to evict Frazier & Oxley from the premises.

In light of this undisputed evidence, the Circuit Court correctly concluded that (1) St. James was solely responsible for preparation and execution of the LTA; (2) because the LTA was not prepared and executed within the time frame set forth in the prime lease, the law of surrender precluded St. James from evicting Frazier & Oxley; (3) having lost in this Court and in the Circuuit Court, St. James is legally precluded from relitigating the surrender issue; (4) as a result of the law of surrender, City could not legally evict Frazier & Oxley; (5) alternately, the LTA, drafted by John Hankins, a licensed attorney and representative of St. James, was ambiguous and failed to adequately describe the scope of the premises to be vacated by City; and (6) there could be no "mutual mistake of law" or "mutual mistake of fact" when St. James admitted that the sublease was never discussed. Thus, St. James suit against City is an exercise in futility and this Court should affirm the Circuit Court's decision.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1976, William Frazier ("Bill Frazier") and four other investors formed First Huntington Building Corporation ("FHBC") and purchased the St. James Building, a twelve-story building in downtown Huntington. (*See* SJ Exhibit A). In 1979, Bill Frazier and Lee Oxley formed The Old National Bank of Huntington ("Old National Bank") (*Id*).

On May 7, 1980, FHBC and Old National Bank entered into a lease ("prime lease") for various areas of the St. James Building. (*Id; see also* SJ Exhibit D). The prime lease included the banking lobby, the mezzanine, and a storage area in the basement, and was for a term of twenty years, beginning on November 1, 1979 and ending on October 31, 1999. (*Id.*). The prime lease also provided that it would automatically renew for twenty consecutive one-year terms unless the lessee provided the lessor with written notice of its intent to vacate the premises within sixty days prior to the expiration of the original term of the lease, or any renewal term of the lease. (*Id.*).

On June 15, 1987, Old National Bank and the law firm of Frazier & Oxley entered into a sublease ("sublease") for portions of the space described in the prime lease, including the mezzanine area. (*Id.*). The sublease was for $250 per month. (*Id.*). The low rent was in consideration of the need for costly, but necessary, improvements to the mezzanine area. (*Id.*). On June 16, 1987, Frazier & Oxley assigned all their rights and obligations under the sublease to Bill Frazier. (*Id.*). Bill Frazier proceeded to spend approximately $200,000 of his own money to renovate the mezzanine into a space suitable for a law firm. (*Id.*).[4]

[4] St. James' brief not so subtly implies that the Frazier & Oxley employed underhanded tactics to receive a sweetheart deal on rent. The evidence shows that Mr. Frazier spent a large sum of his own money to renovate the offices in exchange for this low rent. This is one of many

In 1996, Old National Bank became part of City and the Old National Bank location became a branch office of City. (*Id.*). City became lessee under the prime lease and lessor of the sublease. (*Id.*). City and Frazier & Oxley entered into a settlement agreement in November 1999 as a result of a dispute over the sublease. (*Id.*). The settlement agreement stated that the sublease would expire "upon the expiration or termination of the master/primary lease." (*Id.*). The settlement agreement was silent as to what would happen to the sublease if City surrendered the prime lease. (*Id.*).

By the spring of 2000, City decided that it did not want to continue to occupy its branch office in the lobby of the St. James Building. (*Id*; *see also* SJ Exhibits C, D, E, F). City did want to keep a drive-through location at the St. James Building. (SJ Exhibit A). After various discussions between representatives of St. James and City, beginning no later than April 2000, approximately six months prior to the expiration of the current one year lease term under the prime lease, City and St. James agreed to that City would vacate its branch office in the St. James Building but retain a drive through banking location. (*Id.*). On September 27, 2000, approximately thirty days before the expiration of the one year term of lease under the prime lease, City and St. James entered into a lease for the drive-through location. (*Id.*). Also, on September 27, 2000, immediately after signing the lease for the drive-through, City and St. James signed the LTA (*Id; See also* SJ Exhibit H). The LTA had an effective date of October 31, 2000. (SJ Exhibit A).

The LTA was drafted by John Hankins, a licensed attorney experienced in real estate and landlord/tenant matters. (*Id; see also* SJ Exhibit I). Hankins, an owner and officer of St. James,

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examples of how St. James is attempting to relitigate issues that were litigated in its suit against Frazier & Oxley.

was present during the discussions leading up to the LTA and the drive-through lease. (SJ Exhibit I). Hankins was aware, at all times relevant to the discussions regarding City's desire to vacate its offices in the St. James Building, that the prime lease required at least sixty days written notice by the lessee in order to terminate the prime lease and that there was no provision in the prime lease allowing the parties to waive these notification requirements. (*Id;* SJ Exhibit A). No written notice was ever provided by City. (SJ Exhibit A). The LTA is not entitled "Notice of Nonrenewal" and the words "nonrenewal" are nowhere in the four corners of the document. (*Id*; SJ Exhibit H). The prime lease did not contain a provision allowing the parties to waive the requirement for written notice. (SJ Exhibits A and H). The prime lease required written notice at least sixty days in advance of the expiration of the term of the lease in order to terminate. (SJ Exhibits A and J).

At no time between the April 2000 meeting and the signing of the LTA was the status of the mezzanine or the law firm of Frazier & Oxley ever discussed. (SJ Exhibits C, D, E, F).[5] The

[5] St. James unbelievably continues to cite to affidavits it drafted and had signed by Matthew Call, who was then represented by City's counsel, and Robert Hardwick, who was an officer of City, which was being represented by counsel. These are presented to this Court in support of the position that City employees believed that City intended to turn over the mezzanine and that Judge Hustead ignored a material fact. In fact, aside from a self-serving interrogatory answer by Hankins, these affidavits are the only "evidence" provided to this Court in support of St. James' various positions. As was noted by City to Judge Hustead – and as she clearly understood when determining the facts in this case – the content of these two affidavits, which obtained in violation of the Rules of Professional Conduct, were repudiated during these individuals' depositions, with both testifying that at no time during any of the meetings between City and St. James did the parties discuss the mezzanine or the Frazier & Oxley. When asked, "Am I correct that at that time you hadn't really given it thought about whether nor not these agreements had any effect on Frazier & Oxley's occupancy?," Mr. Hardwick testified, "No, I didn't. I did not. It wasn't part of my thought process." Hardwick Depo. at 54-55. With respect to the affidavit, Mr. Harwick testified that (1) he had asked that corrections be made that were not made by St. James' counsel; (2) he initially refused to sign the affidavit because counsel had advised him not to sign it, but to be deposed instead; and (3) even though he signed it to avoid

effect of the LTA on the mezzanine or the law firm of Frazier & Oxley was never discussed in the meetings between City and St. James. (SJ Exhibits C, D, E, F). Moreover, Hankins was aware prior to drafting the LTA that Frazier & Oxley occupied the mezzanine. (SJ Exhibit I).

Despite overwhelming documentary evidence to the contrary,[6] Hankins - for reasons known only to him - disputes his knowledge of the tenancy of Frazier & Oxley. For example, on August 22, 2000, more than sixty days prior to the expiration of the prime lease, Hankins sent a set of proposed floor plans for Merrill Lynch, with whom Hankins, on behalf of St. James, had been negotiating to lease the space occupied by City. (SJ Exhibit K). The floor plans of this proposal show the mezzanine space as being occupied by "LAW FIRM & ST. JAMES." (***Exhibit A***). If St. James was unaware that Frazier & Oxley were tenants pursuant to the sublease and it believed that City would be giving up the entire leased premises, including the mezzanine, then why would these floor plans to a potential tenant include Frazier & Oxley?

On August 23, 2000, more than sixty days prior to the expiration of the prime lease and the very next day after sending the aforementioned proposal to Merrill Lynch, Hankins forwarded a copy of the plans to Fred Davis, another owner of St. James. (SJ Exhibit L). The

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being deposed, the affidavit was inaccurate. *Id.* at 62-69. Likewise, Mr. Call testified regarding being contacted by Mr. Hankins, Mr. Craig, and Mr. Yon; not being advised by any of them that litigation was pending against City; that he was represented by counsel at the time; that St. James' attorneys continued to contact him even after he advised them he was represented by counsel; and that although he executed the affidavit, it was inaccurate; specifically, he testified that the term "main banking facility" in the LTA did not include the mezzanine because "we did not occupy the space as a bank." Call Depo. at 42-51, 55-63. In any event, the Hardwick and Call affidavits are non-issues because, prior to execution of the LTA, St. James indicated to City, in writing, that it would deal with Frazier & Oxley after execution of the LTA.

[6] This documentary evidence was provided late in the discovery process by St. James to City and, once reviewed, provided much of the basis for City's motion for summary judgment against St. James.

letter to Davis states, "Enclosed herewith is Plan One that has both tenants in this space along with the Frazier Law Firm on the mezzanine . . . ." (*Id.*)(emphasis supplied). If the intent of the parties was for City to vacate the premises (absent a drive through), including the mezzanine, then why would these plans show Frazier & Oxley still occupying the mezzanine? Surely, if this law firm was merely a guest of City or if the intent was that City would give up the mezzanine space, there would be no expectation on the part of St. James that it would remain once City gave up its rights under the prime lease.

Also, on August 23, 2000, Hankins sent a letter to Robert Hardwick, a City employee, regarding City's desire to both end the prime lease and maintain a drive-through location. (SJ Exhibit M). The letter states that "If we decide to proceed, it will probably be necessary to cancel your existing lease and to enter into a new lease for the reduced space. We will also take the responsibility of negotiating a new lease for the law firm located on the mezzanine." (***Exhibit B***)(emphasis supplied).[7] This letter makes clear that not only did Hankins believe that Frazier & Oxley was St. James' tenant, but also that St. James would have to deal with the sublease. If Frazier & Oxley was simply a guest of City, and not occupying the space pursuant to a sublease, it would not be necessary to negotiate a new lease for Frazier and Oxley. The word "new," along with the acknowledgement that such a "responsibility" was necessary, shows that

[7] This is the same Robert Hardwick whose affidavit was improperly obtained well after the LTA was signed in an effort to prove that City believed – prior to entering into the LTA – that the mezzanine space would be returned to St. James. Of course, Mr. Hardwick disputed the affidavit in his deposition, which is certainly understandable considering the fact that St. James sent him correspondence indicating that it did not anticipate that City would be handing over the mezzanine and that this would be an issue that St. James would have to address itself. Indeed, City suspects that this is the reason that St. James' attorneys improperly obtained Hardwick's affidavit, even though he was going to be deposed defended by City's counsel, i.e., St. James knew it was asserting something that just was not truthful.

St. James knew of the sublease and that it needed to be dealt with in a manner distinct from the LTA's ending of City's prime lease.

On September 7, 2000, Hankins forwarded proposed floor plans to Jeffrey Stidham, who represented Merrill Lynch. (***Exhibit C***). These floor plans clearly show the mezzanine continuing to be occupied by a law firm.

On September 8, 2000, after the sixty-day notice requirement but several weeks prior to the signing of the LTA, Hankins forwarded a proposal directly to Merrill Lynch. (SJ Exhibit O). Section 1.2 of the proposal states that the "downtown branch of City National Bank is presently located on the first floor space being offered for lease in the proposal..." (*Id.*). It goes on to state, in section 1.3, that "City National Bank is the only tenant on the ground floor and a law firm is the only tenant on the mezzanine." (***Exhibit D***)(emphasis supplied). Of course, how can St. James claim it was unaware, prior to execution of the LTA, that Frazier & Oxley was a "tenant" when its own written proposal described Frazier & Oxley as a "tenant"?

Instead, this proposal – drafted by Hankins prior to execution of the LTA – unequivocally shows that St. James: (1) was aware that Frazier & Oxley was a "tenant;" (2) believed that the bank only comprised the first or "ground floor;" (3) believed that the mezzanine was separate from the bank and located on an entirely different floor; and (4) anticipated that Frazier & Oxley would continue to be tenant after City left.

It was these undisputed facts and the language of the LTA, drafted by Hankins, that demonstrated there was no issue of material fact concerning any contractual obligation by City to surrender the mezzanine occupied by Frazier & Oxley to St. James.

Not only were documents produced in discovery proving that St. James not only knew about Frazier & Oxley's tenancy prior to execution of the LTA, but intended to deal with Frazier & Oxley's tenancy on its own in the context of leasing the premises to Merrill Lynch, but documents were produced proving that, after execution of the LTA, St. James continued to indicate such knowledge and intention.

In 2001, after execution of the LTA, St. James began negotiating with Fifth Third Bank ("Fifth Third") after failing to reach a deal with Merrill Lynch. On May 23, 2001, approximately seven months after the effective date of the LTA, St. James and Fifth Third signed a lease. (SJ Exhibit P). In a letter to Fred Davis dated May 24, 2001, Hankins wrote that the lease between St. James and Fifth Third was "for the banking facility located on the first floor of the St. James Building." (***Exhibit E***)(emphasis supplied).

The lease itself contained an option to "lease the offices containing approximately 4,000 square feet on the mezzanine level presently leased to the law firm of Frazier and Oxley." (***Exhibit F***)(emphasis supplied). In other words, seven months after the effective date of the LTA, Frazier and Oxley remained in their mezzanine offices pursuant to an already existing lease that St. James knew about.

It must be remembered that, at this point, there was no "existing lease" between St. James and Frazier & Oxley. The only "existing lease" was between City and Frazier & Oxley. Thus, the only "existing lease" to which St. James could have been referring in its negotiations with Fifth Third was the sublease which Hankins now contends he knew nothing about.

Obviously, as this Court has repeatedly held, a disputed issue of fact must be "genuine" and Judge Hustead correctly concluded that, on this point, in light of this overwhelming documentary evidence, no dispute of fact could be "genuine."

It is plain from the language of the lease with Fifth Third, and the fact that St. James did nothing in the time between the effective date of the LTA and this lease with Fifth Third to remove Frazier & Oxley from the premises, (SJ Motion, Exhibit A, p. 7), that St. James was not only aware of the sublease, but considered Frazier & Oxley to be "tenants" under an "existing lease," because its own documents say so.

Nearly a year went by after execution of the LTA with Frazier & Oxley occupying the mezzanine without a word from St. James. At this point, the main banking facility was vacant with City occupying only the drive-through. St. James was attempting to lease the main banking facility to Fifth Third, but apparently was unconcerned about the mezzanine, however, because its proposals both to Merrill Lynch and Fifth Third had carved out the mezzanine for its continued lease to Frazier & Oxley.

Eventually, however, on August 23, 2001, in response to a request by Fifth Third to invoke its option for the mezzanine occupied by Frazier & Oxley, St. James prepared a modified lease agreement, which included the mezzanine. (SJ Exhibit R). Hankins, in a letter to Fifth Third that accompanied the modified lease, stated that the mezzanine was "currently occupied by Frazier and Oxley Law Firm" and that "As soon as I receive a copy of the lease signed by Fifth Third, I will immediately serve a termination notice to Frazier and Oxley . . . ." (*Id.*).

It was only at this point, after the potential lease to Fifth Third may have become contingent upon its access to the mezzanine, that St. James did anything with respect to the

Frazier & Oxley tenancy. And, it is significant that, at that point, St. James did not contact City, which it later sued for breach of contract, but contacted Frazier & Oxley, which it had identified as its "tenant" under an "existing lease."

Specifically, on August 31, 2001, almost one year after execution of the LTA, Daniel Yon sent a letter to Bill Frazier stating that his firm "is counsel for St. James Management Company, LLC. On behalf of St. James Management Company, LLC and pursuant to West Virginia Code § 37-6-5,[8] you are hereby given notice to vacate the premises your firm currently occupies at 401 Tenth Street, Mezzanine Level, by midnight, September 30, 2001." (***Exhibit G***). On August 30, 2001, Hankins sent another letter to Fifth Third informing it that St. James "served a notice as required under West Virginia law on the law firm of Frazier & Oxley to vacate the offices in the mezzanine of the St. James Building . . . ." (SJ Exhibit U).

St. James filed Civil Action No. 01-C-0892 in the Circuit Court of Cabell County ("underlying litigation"). The underlying litigation sought to evict Frazier & Oxley. St. James alleged that, by entering into the LTA with City, that the prime lease was legally terminated. Inasmuch as Frazier & Oxley was occupying space pursuant to the sublease with City's

[8] W. Va. Code § 37-6-5 provides, "A tenancy from year to year may be terminated by either party giving notice in writing to the other, at least three months prior to the end of any year, of his intention to terminate the same. A periodic tenancy, in which the period is less than one year, may be terminated by like notice, or by notice for one full period before the end of any period. When such notice is to the tenant, it may be served upon him, or upon anyone holding under him the leased premises, or any part thereof. When it is by the tenant, it may be served upon anyone who at the time owns the premises in whole or in part, or the agent of such owner, or according to the common law. This section shall not apply where, by special agreement, some other period of notice is fixed, or no notice is to be given; nor shall notice be necessary from or to a tenant whose term is to end at a certain time." Obviously, St. James would not have given a notice to Frazier & Oxley as its "tenant" if it did not believe there was some type of tenancy.

predecessor (and thus in a sublease with City), St. James maintained that the LTA terminated the sublease and that Frazier & Oxley were required to vacate their offices. Of course, if St. James really believed that it had a breach of contract suit against City because it was City's obligation to evict Frazier & Oxley, it begs the question of why it filed an eviction suit against Frazier & Oxley asserting its status as landlord, rather than suing City for breach of contract and/or injunctive relief, requiring City to effectuate the eviction?

St. James offered, as proof for its position against Frazier & Oxley, the settlement agreement that had been entered into between City and Frazier & Oxley in 1999, which stated that the sublease was to run concurrently with the prime lease and would terminate upon either the termination of the prime lease or the expiration of the term of the prime lease.

Frazier & Oxley sought a writ of prohibition from this Court after the Circuit Court granted summary judgment in favor of St. James. In *Frazier & Oxley I*,[9] this Court held that a surrender of a lease did not terminate a sublease and that parties to a lease could not waive termination provisions in that lease to the legal detriment of the sub-lessee. This Court remanded to the Circuit Court, stating that the only issue to be considered on remand was whether the prime lease had been surrendered or terminated pursuant to the LTA.

St. James attempted to amend its complaint to allege various new causes of action against Frazier & Oxley, which requested another writ of prohibition from this Court.[10] In *Frazier &*

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[9] 212 W. Va. 275, 569 S.E.2d 796 (2002).

[10] St. James also attempted to amend its complaint to pursue claims against City. As this Court is aware, City also filed a writ with this Court. In footnote 17, however, this Court recognized that in granting the Frazier & Oxley's writ, it simply need not rule on City's writ. While St. James continues to exclaim that this footnote amounts to <u>an endorsement by this Court of the legitimacy of St. James' case against City</u>, it is nothing more than another example of this Court declining to answer an unnecessary question. In fact, in declining to address City's writ,

Oxley II, in granting the writ of prohibition, this Court stated once again that the sole issue on remand was whether surrender occurred.

On November 18, 2004, after conducting discovery on the surrender issue, the Honorable David M. Pancake held in his order granting summary judgment to the Frazier Defendants ("Summary Judgment Order") that (1) the LTA effected a surrender of the lease by City to St. James; (2) the prime lease did not allow for a waiver of the requirement that termination be made in writing at least sixty days prior to the end of its term; (3) the 1999 settlement agreement between City and Frazier & Oxley had no effect on the surrender question; and (4) in recognition of this Court's clear holding in *Frazier & Oxley I*, that the LTA had no effect on the sublease. (SJ Exhibit A). Summary judgment was granted to the Frazier & Oxley on all of St. James' claims, leaving only the Frazier & Oxley's counterclaims against St. James. (*Id.*). In June 2007, St. James paid Frazier & Oxley $10,000 to settle the counterclaims. (SJ Exhibit S).

On April 9, 2004, over three years after execution of the LTA and over two years after suing Frazier & Oxley for eviction, St. James filed this lawsuit against City. (Docket Entry No. 1). St. James alleged that City was bound to deliver the premises occupied by Frazier & Oxley pursuant to the LTA and claimed breach of contract. St. James also alleged that City had fraudulently concealed the existence of Frazier & Oxley, which had openly occupied the mezzanine space for years, and/or the sublease.

St. James was presented with an opportunity to amend its complaint by adding claims against only City, but n doubt recognizing – based on the various legal rulings against it – that such a cause of action was certain to fail, it chose to hedge its bets on both City and the Circuit Court failing to understand the doctrine of collateral estoppel and other legal issues involved, and never amended its complaint against Frazier & Oxley on remand to assert any claim against City.

On August 2, 2006, after more than two years of no activity, the Circuit Court served a Rule 41(b) notice on St. James stating that the action would be dismissed for failure to prosecute unless good cause was shown by August 26, 2006. (Docket Entry No. 9). Rather than responding to the Circuit Court's notice, however, St. James directed one set of discovery requests, consisting of two separate requests for the production of documents, to City on August 25, 2006. (Docket Entry No. 10).

Thereafter, some eighteen months passed and nothing further occurred that is in any way reflected on the Circuit Court's records, which led to the Circuit Court sending a second Rule 41(b) notice of its intent to dismiss the action for failure to prosecute absent a showing of good cause on January 24, 2008. (Docket Entry No. 13).

In response to the Circuit Court's second Rule 41(b) notice, St. James indicated that it was dropping any fraud claim against City.[11] Because St. James' remaining breach of contract argument was based upon the contention that there had been no surrender, the Circuit Court, at a hearing on June 9, 2008, held that the only issue to be considered in St. James' case against City was whether a surrender of the prime lease had occurred.

At a status conference on September 4, 2008, the Circuit Court again stated that the issue of surrender should be the only issue before the Court, which had been established at the prior hearing, but counsel for St. James disagreed, arguing that it should be permitted to proceed to trial on its contract cause of action regardless of resolution and effect of the surrender issue. Despite St. James' protests, the Circuit Court informed the parties that they could conduct

[11] Amazingly, St. James still seems to be arguing in its brief that City had a contractual duty to notify it of the presence of the sublease, despite the fact that it both affirmatively dismissed its fraudulent concealment cause of action and the undisputed documentary evidence that it knew of the sublease and anticipated that it would survive the LTA.

discovery until November 18, 2008, and should submit any dispositive motions by December 1, 2008. (Docket Entry No. 33).

City propounded discovery requests to St. James and conducted Hankins' deposition. St. James did not serve any discovery requests or conduct any depositions. On December 1, 2008, pursuant to the Circuit Court's order, City filed a motion for summary judgment or, in the alternative, a motion to dismiss for failure to prosecute. St. James filed no dispositive motion; instead, St. James filed a "Motion for Entry of Order Delineating Justiciable Issues," seeking to relitigate prior rulings by this Court in *Frazier & Oxley I* and *Frazier & Oxley II* and by Judge Pancake in his summary judgment order, which order St. James never appealed.

Thereafter, on December 19, 2008, the Circuit Court heard argument on the competing motions of the parties, and allowed supplemental briefing and the submission of evidence. By Order entered on March 23, 2009, the Circuit Court granted summary judgment to City on St. James' breach of contract claims, concluding that:

> (1) St. James is collaterally estopped from re-litigating the issue of surrender;
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> (2) City was legally precluded from forcing Frazier & Oxley from the premises because the execution of the LTA, prepared by St. James, effectuated surrender of the Prime Lease and, by operation of law, Frazier & Oxley then became the direct tenant of St. James;
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> (3) the language of the LTA, prepared by St. James, was ambiguous and, construing it against St. James, did not legally obligate City to force Frazier & Oxley from the premises, following execution of the LTA; and
>
> (4) there could be no "mutual mistake of law" because Frazier & Oxley's departure from the premises was to occur in the future and because the legal issue, Frazier & Oxley's right to continue its occupancy under the Sub-Lease in the event of a surrender, was never discussed by St. James and City and, furthermore, St. James clearly believed at all relevant times that Frazier & Oxley would remain a tenant after the effective date of the LTA.

St. James' appeal of this order has no merit as (1) it was St. James failure to timely prepare and present the LTA for execution that resulted in application of the law of surrender which made Frazier & Oxley, upon its execution, the direct tenant of St. James, and extinguished any tenancy between City and Frazier & Oxley; (2) St. James failed to appeal Judge Pancake's order ruling that execution of the LTA effectuated a surrender of the prime lease, making Frazier & Oxley its direct tenant and because City and Frazier & Oxley, with respect to the leased premises, were in privity, St. James is precluded from litigating the issue of surrender; (3) once Frazier & Oxley became a direct tenant of St. James, City had no legal right and/or obligation to evict Frazier & Oxley from the premises; (4) the use of the terms "main banking facility" and "certain banking facility" in the LTA created an ambiguity which the law requires be construed against St. James; and (5) there could be no "mutual mistake of law"[12] because St. James admits that the issue of surrender was never discussed or contemplated by either St. James or City.

III. DISCUSSION OF LAW

A. STANDARD OF REVIEW

Summary judgment is appropriate if, from the totality of the evidence presented, the non-moving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.[13] A motion for summary judgment must be granted if "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law."[14] The party opposing the motion may not rest upon "mere allegations or denials," but must

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[12] During the course of litigation in Circuit Court, St. James withdrew its "mutual mistake of fact" argument.

[13] Syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

[14] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

"set forth specific facts showing that there is a genuine issue for trial."[15] This standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.[16] A dispute about a material fact is "genuine" only when a reasonable jury could render a verdict for the nonmoving party.[17]

In this case, City was plainly entitled to summary judgment because there were simply no genuinely disputed issues of fact that, if resolved in St. James' favor, would have established any breach of the LTA. First, St. James was required, as a matter of law, to inquire into the basis for Frazier & Oxley's occupancy of the mezzanine. Second, St. James represented to City that it would deal with Frazier & Oxley upon execution of the LTA. Third, St. James was solely responsible for preparation and presentation of the LTA for execution by City. Fourth, once St. James and City executed the LTA, all of City's rights and obligations with respect to the leased premises were extinguished. Fifth, immediately upon execution of the LTA, St. James became Frazier & Oxley's landlord by operation of law and neither St. James nor City had any right to evict Frazier & Oxley from its leased premises. Finally, it was legally impossible for City to deliver the Frazier & Oxley leasehold to St. James and, thus, City cannot be held liable for breach of the LTA for its failure to do so. Thus, this Court should affirm the Circuit Court's judgment.

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[15] W. Va. R. Civ. P. 56(e).

[16] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986).

[17] *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 474 S.E.2d 872 (1996).

B. BECAUSE THE CIRCUIT COURT CORRECTLY HELD THAT ST. JAMES IS COLLATERALLY ESTOPPED FROM RELITIGATING THE ISSUE OF SURRENDER, WHICH AUTOMATICALLY TERMINATED ANY TENANCY BETWEEN CITY AND FRAZIER & OXLEY, WHICH MADE FRAZIER & OXLEY THE DIRECT TENANT OF ST. JAMES, AND WHICH PRECLUDED EITHER CITY OR ST. JAMES FROM EVICTING FRAZIER & OXLEY, THIS COURT SHOULD AFFIRM THE CIRCUIT COURT'S RULING.[18]

St. James alleged that City was clearly obligated, pursuant to the LTA, to give up the mezzanine area and evict the law firm of Frazier & Oxley. This Court already held in *Frazier & Oxley I*, however, that a tenant, in surrendering a lease,[19] cannot legally extinguish the rights of the subtenant.[20] In other words, surrender has no legal effect on a sublease; the subtenant's rights survive the surrender and the subtenant automatically becomes the direct tenant of the landlord.[21] Moreover, on remand in the underlying action to determine whether the prime lease

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[18] St. James inaccurately describes Judge Hustead as ruling that "the breach of contract issue . . . did not survive the West Virginia Supreme Court's holding in Frazier & Oxley II," Assignment of Error No. 1, and that "the breach of contract issue . . . is collaterally estopped by the eventual adjudication of the surrender issue in the eviction proceeding," Assignment of Error No. 2. Not only did Judge Hustead never make such ridiculous rulings, but City never made such ridiculous arguments. Rather, Judge Hustead carefully analyzed St. James' breach of contract claim and correctly concluded that there were no genuine issues of material fact upon which St. James could prevail on such claim. Specifically, Judge Hustead ruled that because, as a matter of law and a matter of collateral estoppel, execution of the LTA constituted a surrender of the prime lease, St. James became Frazier & Oxley's direct landlord, and any eviction by St. James or City was legally impossible. Frankly, this type of mischaracterization by St. James has permeated its litigation against both Frazier & Oxley and City.

[19] A "surrender" is the giving up of a lease before its expiration. *Frazier & Oxley I.*

[20] *Frazier & Oxley I* at 281, 569 S.E.2d at 802 ("'[t]he surrender of a lease by a lessee to his or her lessor, after a sublease, will not be permitted to operate so as to defeat the estate of a sublessee.'") (citation omitted).

[21] *See also Precision Dynamics Corp. v. Retailers Representatives, Inc.*, 120 Misc.2d 180, 465 N.Y.S.2d 684 (1983)("Equally well settled is that when a sublessor voluntarily surrenders his main lease not pursuant to any provision of such lease and same is accepted by the landlord, the subtenant becomes the immediate tenant of the original lessor and the interest and terms of the subtenant continue as if no surrender had been made. . . . The effect of a voluntary surrender is

was "terminated" or "surrendered," Judge Pancake held, in clear and unambiguous language, that the LTA affected a surrender of the prime lease and ruled that the Frazier & Oxley was entitled to summary judgment as to all of St. James' claims.[22] Accordingly, the Circuit Court was correct when it held that St. James was precluded from relitigating whether a surrender of the prime lease occurred and that the sublease survived the LTA.

"Collateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit."[23] Collateral estoppel will bar a claim if four conditions are met: (1) the issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action;[24] and

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equivalent to a transfer of the reversion, the interests of the landlord and tenant merge, and what remains is the landlord's fee subject to the subtenancy. Such subtenancy remains because the landlord and tenant may not affect the rights of third parties who are not parties to their separate surrender agreement."); 49 Am. Jur. 2d *Landlord & Tenant*, § 263, *Surrender, Effect as to Third Parties*, p. 246 (A surrender, while extinguishing the rights between the parties to a lease, does not destroy the interests of third persons who at the time of the surrender had rights. The rights of those third parties will not be defeated by the operation of the surrender.)

[22] Judge Pancake's decision fully dismissed St. James arguments that: (1) the previous 1999 settlement agreement between City and Frazier & Oxley had any effect on the rights of Frazier & Oxley to continue as subtenants and (2) that City and St. James could somehow agree to waive the requirement that City submit written notice of its intent to terminate the prime lease. While St. James and Frazier & Oxley settled the counter-claims of Frazier & Oxley against St. James, Judge Pancake's summary judgment decision clearly answered the surrender question and was binding against St. James in this case.

[23] Syl. pt. 2, in part, *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983).

[24] Obviously, City, as sublessor, is in privity with Frazier & Oxley, as sublessee. See, e.g., *Kim v. Council of Unit Owners for Collington Center III Condominium*, 180 Md. App. 606, 952 A.2d 346 (2008)(purported owner of condominium unit was in privity with tenant who

(4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.[25]

In this case, the issue of whether there was a surrender of the prime lease was decided in the underlying litigation four years ago, guided by the clear legal authority of this Court set forth in *Frazier & Oxley I*, *Frazier & Oxley II*, and applied by Judge Pancake in his order granting summary judgment to Frazier & Oxley. The surrender issue decided by the Circuit Court in the underlying litigation was based on the exact same facts and evidence as presented to the Circuit Court in this instant litigation. Judge Pancake's decision in the underlying litigation, comprised of twenty-one pages of well developed findings of fact and conclusions of law, clearly held that surrender occurred and that therefore the sublease survived the LTA. St. James, the plaintiff in both the underlying litigation and the instant litigation, failed to appeal Judge Pancake's decision granting summary judgment to Frazier & Oxley and, while disagreeing with the conclusion, recognizes, as demonstrated by its discovery responses and brief to this Court, that the surrender issue was definitively decided in the underlying litigation.

A summary judgment is a final decision on the merits.[26] St. James had an opportunity to litigate the surrender issue in the underlying litigation. Once summary judgment was granted in favor of Frazier & Oxley, the appropriate remedy challenging the finding that surrender had occurred would have been an appeal, not subsequent litigation involving the same question.

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allegedly sold interest in unit for purposes of res judicata and, thus, ruling in previous litigation between landlord and tenant was entitled to preclusive effect in subsequent litigation).

[25] *Holloman v. Nationwide Mut. Ins. Co.*, 217 W. Va. 269; 617 S.E.2d 816 (2005) (*citing* Syl. pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995)).

[26] *Tolley v. Carboline Co.*, 217 W. Va. 158, 164, 617 S.E.2d 508, 514 (2005) (citation omitted).

Likewise, the Circuit Court was correct when it held that the surrender issue was dispositive of any breach of contract claims by St. James against City, inasmuch as a party, such as City, cannot be forced to comply with a provision of a contract that it cannot legally enforce. Once St. James and City executed the LTA prepared and presented by St. James, Frazier & Oxley became St. James' tenant to be dealt with by St. James which, again, advised City prior execution of the LTA, would be its responsibility. Again, this was an issue of law, not of fact and, accordingly, no jury issue was presented regarding whether City's alleged failure to surrender the mezzanine constituted a breach of contract.

Even if the LTA could be construed as requiring City to surrender the mezzanine, which it disputes, the Circuit Court correctly concluded that City cannot be found to have breached the LTA by failing to perform an act that it was prohibited by law from performing.[27] In other words, there was no way for City to legally comply with its alleged contractual duty to hand over the mezzanine space occupied by Frazier & Oxley where it is futile to demand that a party give away more than one has.[28] As Judge Pancake held, "Frazier & Oxley's property interests did not revert to St. James Management since City National Bank could not give back to St. James Management what it no longer had." (SJ Exhibit A) (emphasis supplied).[29]

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[27] *See Chatlos Systems, Inc. v. Kaplan*, 147 B.R. 96 (Bankr. D. Del. 1992)(following rejection of its unexpired lease, debtor-tenant had no statutory, contractual or possessory rights in property and therefore had no basis on which to bring eviction action against its subtenant).

[28] *Waksman Enterprises, Inc. v. Oregon Properties, Inc.*, 862 So.2d 35, 43 (Fla. Ct. App. 2003) (citation omitted); *In re Country World Casinos, Inc.*, 202 B.R. 500, 511 (Bank. D. Colo. 1996) ("The law does not require a person to do a useless or futile act.").

[29] See also 49 Am. Jur. 2d *Landlord and Tenant* § 207 (2010)("The 'surrender' of a lease is the yielding up of the estate to the landlord, so that the leasehold interest becomes extinct by a mutual agreement between the parties.")(footnote omitted). Once City "surrendered" the prime

By arguing that the issue of surrender has no bearing on City's obligations to comply with provisions of a contract, St. James was proposing to the Circuit Court, as it is now proposing to this Court, that it is legally permissible to punish a defendant for failing to comply with a provision of the contract that, according to this Court, cannot be legally complied with.

It is black-letter law that "[w]here performance of a contractual promise is rendered impossible by the law, nonperformance is excused."[30] Again, any argument that City brought about this impossibility ignores the undisputed evidence that St. James informed City that it would deal with Frazier & Oxley after execution of the LTA; undertook the responsibility to

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lease to St. James, City had no further interest in the leasehold and no right or obligation, as a matter of law, to evict the sublessee, Frazier & Oxley.

[30] *Toledo Police Patrolmen's Assn., Local 10, IUPA* v. Toledo, 94 Ohio App. 3d 734, 739, 641 N.E.2d 799, 802 (1994)(citation omitted); *see also* RESTATEMENT OF THE LAW (SECOND) OF CONTRACTS § 265 (1981)("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary."); *In re Parent*, 155 B.R. 310, 314 (Bank. D. Conn. 1993)("Performance by a party may be excused where the law intervenes to prohibit such performance . . . ."); *First Federal Sav. and Loan Ass'n of Rochester v. U.S.*, 76 Fed. Cl. 106 (2007)("'"[W]hen a party to a contract is sued for breach, it may defend on the ground that there existed a legal excuse for its nonperformance at the time of the alleged breach."'")(citations omitted); *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 664 (7th Cir. 1995)("The doctrines of impossibility, impracticability, and frustration, which operate as implied terms in contracts, sometimes excuse noncompliance with contractual duty altogether."). In its brief, St. James cites this Court's opinion in *Waddy v. Riggleman*, 216 W. Va. 250, 606 S.E.2d 222 (2004), but that case involved Section 261 of the RESTATEMENT (SECOND) OF CONTRACTS, dealing with impracticality, not Section 265 of the RESTATEMENT (SECOND) OF CONTRACTS, dealing with legal impossibility. In *Waddy*, this Court correctly concluded that the requested performance may have been difficult, but it was not legally impossible and, therefore, issues of fact were presented precluding summary judgment. Here, of course, it was legally impossible for City to tender the mezzanine to St. James as soon as the LTA was executed because, as a matter of law, upon its execution, City's obligations were discharged; Frazier & Oxley automatically became St. James' tenant; and neither St. James nor City had the right to evict Frazier & Oxley from the premises. Frankly, it is for that reason that, in its brief, St. James effectively concedes the issue of impossibility. Appellants' Brief at 23.

draft the LTA; and admits that it could have drafted the LTA in time to comply with the prime lease, which would have avoided any difficulty in St. James evicting Frazier & Oxley from premises which, at that point, would have had no lease.[31]

In this case, there was a surrender of the prime lease that both terminated City's rights under the prime lease and substituted St. James as the landlord; therefore, City had no legal right to give back the mezzanine area or to remove Frazier & Oxley. Thus, any provision of the LTA which St. James alleges requires City to deliver the mezzanine space occupied by Frazier & Oxley was simply unenforceable. To rule otherwise would impose upon City a contractual duty

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[31] St. James had no obligation to accept City's "surrender." See 49 Am. Jur. 2d *Landlord and Tenant* § 208 (2010)("A termination of a lease agreement occurs when the tenant surrenders the tenancy and the landlord accepts the tenant's surrender. It follows from the above that the surrender of a lease may not be forced upon a landlord by the unilateral actions of the tenant, and although a tenant may attempt to surrender a lease, the lease will not be terminated unless the landlord accepts the surrender. Thus, no 'surrender of lease' occurs if the landlord refuses to accept the tenant's surrender of the premises.")(footnotes omitted). Once it accepted City's surrender, however, St. James released City, as a matter of law, from all obligations with respect to its tenancy, including the obligation to evict its sublessee. See 49 Am. Jur. 2d *Landlord and Tenant* § 211 (2010)("Generally, surrender of the premises terminates any rights or obligations that the tenant and landlord have under the lease agreement. . . . . [T]he surrender of a lease by a tenant . . . operates . . . to release the tenant from liability on the covenants taking effect after the date of the surrender . . . .")(footnotes omitted). This is because "surrender of a lease is never allowed to operate injuriously upon the rights of third parties, or to affect the estate of the underlessee. Although a surrender operates between the parties as an extinguishment of the interest which is surrendered, it does not do so as to third persons who at the time of the surrender had rights which such an extinguishment would destroy, and as to them the surrender operates only as a grant subject to their right, and the interest surrendered still lies for its preservation, that is, interests in the leasehold acquired by third parties prior to the surrender will not be defeated by operation of the surrender." *Id.* (footnotes omitted). St. James knew about Frazier & Oxley's occupancy of the mezzanine; was required to inquire as to the basis of that occupancy; and was required to secure its approval of termination of the sublease: "If the surrender of a prime lease is with the consent of the subtenant, it will terminate his or her estate." *Id.* (footnote omitted). It is only because it failed to do what it was legally obligated to do that St. James was burdened with the Frazier & Oxley tenancy after execution of the LTA.

to remove a tenant that this Court and Judge Pancake have held had a right to remain.[32] Consequently, this Court should affirm the Circuit Court's grant of summary judgment.

C. BECAUSE THE CIRCUIT COURT CORRECTLY HELD THAT THE LANGUAGE OF THE LTA, PREPARED BY ST. JAMES, WAS AMBIGUOUS AS TO THE LOCATION OF THE "MAIN BANKING FACILITY," THIS COURT SHOULD AFFIRM THE CIRCUIT COURT'S RULING.

In addition to its conclusion that any contractual duty of City to transfer any possessory right to the mezzanine was unenforceable under the law of surrender, the Circuit Court also concluded that the language of the LTA was ambiguous as to whether City had any contractual

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[32] In its brief, St. James argues that even if it was legally impossible for City to perform what St. James asserts was its contractual obligation, i.e., eviction of Frazier & Oxley, it should nevertheless be permitted to proceed upon some sort of claim that St. James should be returned to its pre-contract status. First, this Court will search the record in vain for any assertion by St. James in the proceedings before Judge Hustead. Second, its argument has no merit because (1) it now relies upon a claim of breach of oral contract, Appellants' Brief at 24, which was never raised below and suffers the same defects as its breach of written contract claim; (2) it relies upon an alleged duty on the part of City to disclose the sublease, *id.* at 25, when the law required St. James, which was aware of Frazier & Oxley's occupancy, to inquire and requires nothing of City; (3) it places burdens on City with respect to the LTA and dealing with Frazier & Oxley, *id.*, when it assumed both preparation and presentation of the LTA and dealing with Frazier & Oxley following its execution; and (4) the case it relies upon, *Wysong v. Bd. of Educ.*, 86 W. Va. 57, 102 S.E. 733 (1920), does not stand for the proposition advanced by St. James. Rather, *Wysong* is a *quantum meruit* case holding that an architect was entitled to compensation for such portion of work that had been performed under a contract that was legal at the time of its execution, but became illegal following its execution: "But where such contract is lawful at the time it is entered into, but the full performance thereof by the parties is rendered impossible by some supervening act beyond their control, and the architect has performed the services of making the plans and specifications and is prevented, because of such intervening cause, from performing the whole contract, he will be entitled, in an action for a breach thereof, to recover the value of his services for the part of the contract actually performed by him . . . ." Syl. pt. 5. Obviously, the law of *quantum meruit* has no application under the circumstances of this case. Moreover, if St. James prevails on this theory, i.e., it is entitled to be returned to its pre-LTA position, then like the school board in *Wysong*, which was allowed to keep the benefit of the architect's efforts, City would be entitled to be returned to its pre-LTA position, i.e., occupancy of both the main banking facility, under the terms of the existing lease, and landlord to Frazier & Oxley, which is obviously and patently unworkable, particularly considering that St. James no longer owns the building.

obligation to transfer any possessory right to the mezzanine. Indeed, the Circuit Court noted in its Order that counsel for St. James admitted during the course of arguments that the LTA was poorly drafted and that Mr. Hankins, a licensed attorney experienced in real estate and landlord/tenant matters as well as an owner and officer of St. James at the time, was responsible for drafting the LTA.

The LTA states that the prime lease was for "that certain banking facility located on the ground floor and mezzanine located in the St. James Building . . . ." (emphasis supplied).

The LTA also states that the prime lease "is hereby terminated effective October 31, 2000, at which time possession of the main banking facility located within the St. James Building will be surrendered to St. James." (emphasis supplied).

An ambiguity arises as to what is the "main banking facility" as opposed to a "certain banking facility." A clear use of language would have repeated the word "certain" a second time or would have used the word "main" both times and repeated the inclusion of the mezzanine in both instances. By defining the scope of the lease of "that certain banking facility" as including "the ground floor and mezzanine" in the beginning of the LTA, but referring to the "surrender" of only the "main banking facility,"[33] St. James, as drafter of the LTA, created an ambiguity.

"The term 'ambiguity' is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning."[34] "The question as to whether a contract is ambiguous," is not a question of fact to be presented to a jury, but "is a question of law to be determined by the

[33] Without any reference to the mezzanine.

[34] Syl. pt. 4, *Estate of Tawney v. Columbia Natural Resources, L.L.C.*, 219 W. Va. 266, 633 S.E.2d 22 (2006).

court."[35] Likewise, "'It is the province of the court, and not of the jury, to interpret a written contract.'"[36] Finally, "It is also well settled that any ambiguity in a contract must be resolved against the party who prepared it."[37]

The evidence presented in this case is clear – based on the correspondence sent from St. James to Wells Fargo, Fifth Third, and Robert Hardwick – that St. James (1) knew about Frazier & Oxley's presence in the mezzanine; (2) knew that such presence was the result of a lease; (3) intended to deal with Frazier & Oxley after execution of the LTA; (4) did not intend for Frazier & Oxley to vacate the mezzanine; (5) intended to continue to lease the mezzanine to Frazier & Oxley until Fifth Third indicated a desire to lease the mezzanine; and (6) considered itself Frazier & Oxley's landlord when it instituted an eviction suit in that capacity.

This is, no doubt, why the LTA has inconsistent language that differentiates between the "main banking facility" and the "certain banking facility" and does not repeat the inclusion of the word mezzanine, i.e., both before and after its execution, St. James and Hankins considered the mezzanine, occupied for years by Frazier & Oxley, to be a separate issue from the "main banking facility," occupied first by Old National, then by City, and then by Fifth Third.

Based upon these standards, the Circuit Court correctly held that the language in the LTA referencing "certain banking facility" and "main banking facility" created an ambiguity which must be resolved against St. James and, therefore, the LTA did not impose upon City a

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[35] Syl. pt. 1, in part, *Berkeley County Pub. Serv. Dist. v. Vitro Corp. of Am.*, 152 W. Va. 252, 162 S.E.2d 189 (1968) (emphasis supplied).

[36] Syl. pt. 1, *Stephens v. Bartlett*, 118 W. Va. 421, 191 S.E. 550 (1937)(*quoting Franklin v. Lilly Lumber Co.*, 66 W. Va. 164, 66 S.E. 225 (1909)).

[37] *Nisbet v. Watson*, 162 W. Va. 522, 251 S.E.2d 774 (1979).

contractual obligation to surrender the mezzanine. Accordingly, this Court should affirm the Circuit Court's grant of summary judgment.

D. BECAUSE THE CIRCUIT COURT CORRECTLY HELD THAT THERE WAS NO MUTUAL MISTAKE OF LAW THAT WOULD JUSTIFY SETTING ASIDE THE LTA, THIS COURT SHOULD AFFIRM THE CIRCUIT COURT'S RULING.

With respect to St. James' "mistake of fact" argument, which it eventually withdrew, this Court has noted that, "A mistake of fact consists of an unconscious ignorance or forgetfulness of a material fact, past or present, or of a mistaken belief in the past or present existence of a material fact which did not or does not actually exist."[38] "As a general rule, one who enters into a contract or performs some act while laboring under a mistake of material fact is entitled to have the transaction or the act set aside in a court of equity . . . ."[39] It is recognized that "a party may not avoid the legal consequences on the ground of mistake, even a mistake of fact, where such mistake is the result of the negligence of the complaining party."[40] Here, St. James knew about the occupancy of Frazier & Oxley in the mezzanine, but failed to make the required inquiry or to make express provision for the same in the LTA. Consequently, St. James withdrew its claim that the LTA should be set aside because of a "mistake of fact."

With respect to St. James' "mistake of law" argument, this Court recently reiterated in Syllabus Point 2 of *Ryan v. Ryan*,[41] "'A mutual mistake is one which is common to all parties, wherein each labors <u>under the same misconception respecting a material fact or provision within</u>

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[38] *Webb v. Webb*, 171 W. Va. 614, 301 S.E.2d 570 (1983).

[39] *Id.*

[40] *Id.* (citations omitted).

[41] 220 W. Va. 1, 640 S.E.2d 64 (2006)(*quoting* Syl. pt. 4, *Smith v. Smith*, 219 W. Va. 619, 639 S.E.2d 711 (2006)) (emphasis supplied).

the agreement.'" In *Ryan*, this Court rejected St. James' argument that a mutual mistake by one contracting as to the occurrence of a future event (here, City's surrender of the mezzanine) entitles it to relief against the other contracting party:

> The Court of Appeals for the Fourth Circuit addressed the issue here considered quite well:
>
> > In determining whether there has been a mutual mistake of fact, we must examine the facts as they existed at the time of the agreement. . . . A mutual mistake in prophecy or opinion may not be taken as a ground for rescission where such mistake becomes evident through the passage of time. What is today only a conjecture, an opinion, or a guess, might by tomorrow, through the exercise of hind-sight, be regarded then as an absolute fact.
>
> *United States v. Garland*, 122 F.2d 118, 122 (1941) (internal citation omitted). We agree. A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a "mistake" for the purpose of reforming a contract or making a contract voidable.[42]

Here, even assuming that the parties contemplated at the time of execution of the LTA that City would be able to surrender the mezzanine, which was never discussed, because such surrender was to occur in the future, it cannot form the basis for any relief under West Virginia law.

The only case relied upon by St. James, *Brannon v. Riffle*,[43] compelled rather than frustrated the award of summary judgment in this case. In *Brannon*, unlike the instant case, the two contracting parties expressly discussed and agreed upon a present state of affairs at the time of the contract of which they were mutually mistaken:

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[42] *Id.* at 7, 640 S.E.2d at 70 (emphasis supplied).

[43] 197 W. Va. 97, 475 S.E.2d 97 (1996).

> The parties agree that during the course of these discussions Appellees never indicated to Appellants that there were any problems with the leases. An oral agreement to purchase the oil and gas assets from Appellees was reached and subsequently three separate brief writings memorializing the agreement were signed on or about August 14, 1990. The agreements provided that Appellants had six months prior to the time payment was owed to Appellees for the purchase.
>
> Apparently as a result of a title search performed for Appellants in October 1990, they discovered the existence of certain problems with the leases. The primary obstacle resulted from the fact that the Eddy lease had as a requirement to its continuation that either three wells be drilled within a two-year period following Appellees' execution of the lease in 1983 or alternatively, required a payment of liquidated damages. Because only two wells had been drilled during the initial two-year period and because liquidated damages had not been paid, Appellants realized that the lease had possibly expired. When the six month period had passed and payment was due in connection with the buy/sell agreements, Appellants failed to pay Appellees pursuant to the terms of the three agreements.[44]

Although the case turned primarily upon the constructive notice doctrine, this Court made clear that mutual mistake would only apply where the contracting parties, unlike the present case, actually considered and contemplated a set of circumstances that did not exist at the time of the contract:

> The doctrine of constructive notice places subsequent purchasers on notice of all facts which could be discovered by searching the record of a duly-recorded instrument. Syl. Pt. 2, *Smith v. Owens*, 63 W. Va. 60, 59 S.E. 762 (1907); see also W. Va. Code § 40-1-9 (1982); *see generally* 15 Michie's Jurisprudence Recording Acts § 15 (West 1979). The circuit court expressly found that
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> > The law of this State is that a purchaser of real property, which would include the oil and gas leases in question in this case, is charged with constructive knowledge of what the lease document contains even

[44] *Id.* at 99, 475 S.E.2d at 99 (emphasis supplied and footnote omitted).

> though such purchaser may never have seen it if the document is recorded in the office of the Clerk of the County Commission of the County in which the property is located. Therefore, the defendants were charged with the knowledge that the Eddy lease had expired by its own terms before they entered into the August 14, 1990, agreement to purchase.

The circuit court reasoned further that the

> defendants' [Appellants'] theory of mutual mistake of fact between the parties is not applicable, as a matter of law, as the only possibility of that theory being applicable was the condition or status of the Eddy lease, and ... the defendants were charged with constructive knowledge that the Eddy lease may be forfeited by its terms.

In concluding that the doctrine of constructive notice precluded reliance on the defense of mutual mistake, however, the circuit court overlooked the fact that

> it is generally recognized that a mistake as to the legal effect of a contract, though a mistake of law, will be treated as a mistake of material fact where the mistake is mutual, or <u>common to all parties to the transaction</u>, and results in a written instrument which does not embody the "bargained-for" agreement of the parties. . . .

Having reviewed the record in this case, we conclude that there are various legitimate inquiries proper for jury resolution regarding whether <u>both Appellants and Appellees were under the impression, albeit incorrect, that the Eddy lease had not lapsed at the time the buy/sell agreements were signed</u>. As discussed above, the conversion of a mistake of law into a resulting mistake of fact permits a transaction to be set aside. *Id.* at 616, 301 S.E.2d at 572, syl. pt. 1.[45]

In the instant case, of course, it is undisputed that the issue of Frazier & Oxley's continued occupancy of the mezzanine was never discussed prior to the LTA; the issue of surrender was

[45] *Id.* at 100-101, 475 S.E.2d at 100-101 (emphasis supplied).

never discussed prior to the LTA; and there is no pre-LTA evidence of any mutual mistake by the parties concerning Frazier & Oxley's continued occupancy of the mezzanine.

The Circuit Court correctly concluded that there could be no "mutual mistake of law" regarding a legal issue, *i.e.*, Frazier & Oxley's right to continue its occupancy under the sublease in the event of a surrender, that was never discussed by St. James and City.[46] Moreover, as already discussed, any provision of the LTA requiring City to deliver the mezzanine space occupied by Frazier & Oxley was unenforceable, and it is well-established that "[a]n agreement which cannot be performed without a violation of the law is illegal and void, whether or not the parties knew the law."[47]

Simply put, St. James wants to have it both ways. It wants to argue that, despite its own documentary evidence to the contrary, like Captain Renault in Casablanca exclaiming, "I'm shocked, shocked to find that gambling is going on in here!," it was "shocked" to learn that Frazier & Oxley was occupying the mezzanine, where it had been located for years, pursuant to a lease. But, it also wants to argue that there was a "mutual mistake of law" because the parties erroneously assumed that this lease, which it allegedly knew nothing about, was not terminated along with the prime lease when the LTA was executed.

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[46] Indeed, St. James does not dispute that the issue was never discussed; rather, it wants to argue that because, in response to litigation, City took the post-LTA position that Frazier & Oxley's tenancy was coterminous with the prime lease, St. James can argue to a jury that this is evidence of pre-LTA intent. Appellant's Brief at 33-34. Obviously, this is as ridiculous as its argument that what City employees, who had nothing to do with the LTA, believed was the legal effect of a document drafted by St. James. *Id.* at 34. The evidence is abundantly clear that no one, not St. James or City, contemplated the issue of surrender and, as a matter of law, not fact, one cannot make a "mutual mistake" about something one never contemplated.

[47] 17A Am. Jur. 2d *Contracts* § 228 (2008) (footnotes omitted).

Like the croupier who then states to Captain Renault, "Your winnings, sir," St. James was only "shocked" when it served its purposes, i.e., attempting to have City bear the financial burden of its own unilateral mistake after its failure to evict Frazier & Oxley was unsuccessful because it had failed to prepare and present the LTA for execution within the deadline set forth in the prime lease. Consequently, this Court should affirm the Circuit Court's ruling.

E. IN LIGHT OF THIS COURT'S RECENT DECISION IN *LLOYD'S INC. V. LLOYD*, RES JUDICATA SHOULD PROHIBIT ANY RECOVERY BY ST. JAMES

With respect to the application of *res judicata*, this Court has stated that:

> Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.[48]

Recently, in *Lloyd's Inc. v. Lloyd*, 2010 W. Va. LEXIS 10 (March 4, 2010), in considering a procedurally similar case to this, this Court clarified the third element. Specifically, this Court recognized that so long as the two cases are similar in nature and that the claims asserted in the second case could have been resolved in they had been brought in the previous action, *res judicata* can prohibit the second case.[49] In other words, it is not necessary

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[48] Syl. pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

[49] *Id.* at *21-25. See also Syl. pt. 4. ("An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential

that each and every issue or cause of action was affirmatively addressed in a prior proceeding to invoke *res judicata*. In *Lloyd*, this Court noted that the record was clear that the appellant's attempted complaint included claims that were either resolved in the underlying litigation or could have been if properly presented to the circuit court.

In this case, it cannot be disputed that the first two elements are satisfied. The underlying litigation was decided on the merits and City, as the sublessor, is in privity with Frazier & Oxley. With respect to the third element, it is clear that St. James had the opportunity – and in fact at one point took affirmative steps - to assert any claims against City in the underlying litigation. St. James' current contract claims existed at the time of the underlying litigation and yet St. James, in light of *Frazier & Oxley II*, abandoned its attempt to add those claims against City. All the evidence, documentary, or otherwise existed at the time of the underlying litigation. In other words, St. James' current case against City was ripe to be heard as part of the underlying litigation, could have been easily decided at the same time as the underlying litigation, and would have disposed of all of the issues now before this Court.

As was the case in *Lloyd*, City was a necessary party for the proper resolution of the various disputes present in the underlying litigation and, aside from some abstract tactical explanation, St. James, as with the appellant in *Lloyd*, failed to bring its claims against City until much later. If St. James had, at any point in time in the underlying litigation, but especially either while City was still a named party or after this Court, in *Frazier & Oxley II*, declined to

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that the matter should have been formally put in issue in a former suit, but it is sufficient that the *status* of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata.*")(citing Syl. pt. 1, *Sayre's Adm'r v. Harpold*, 33 W. Va. 553, 11 S.E. 16 (1890), internal quotations omitted).

rule on City's writ,[50] brought its contract claims against City it is obvious that Judge Pancake would have had the ability to decide the claims present here and that the decision would have been adverse to St. James. Therefore, St. James' complaint against City, which "could have been resolved had it been presented in the prior litigation,"[51] is barred by *res judicata* and the Circuit Court properly granted City's motion for summary judgment.

IV. CONCLUSION

For whatever reason, after abandoning this case for over three and a half years, St. James decided to take one more crack at relitigating what this Court decided in *Frazier & Oxley I* and *Frazier & Oxley II.* Instead of doing it directly, however, in the form of an appeal from Judge Pancake's summary judgment order in what would have been *Frazier & Oxley III*, St. James attempted to do so in the context of litigation against City.

Judge Hustead, however, properly rejected this attempt and ruled that St. James could not maintain a suit against City for breach of the LTA because: (1) under the law of surrender, which St. James could not relitigate, transfer of the mezzanine leased by Frazier & Oxley was legally impossible and unenforceable;[52] (2) construing the LTA against St. James, as its drafter, it did not require City to transfer the mezzanine, occupied by Frazier & Oxley, to St. James;[53] (3) and (3) there was no mutual mistake of law or fact as neither Frazier & Oxley's tenancy,

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[50] Thereby leaving the door open for the proposed addition of claims against City in the underlying litigation.

[51] *Id.* at *27 (citing Syl. pt. 4, in part, *Blake*, 201 W. Va. 469, 498 S.E.2d 41, internal quotations omitted).

[52] Order at ¶ 61.

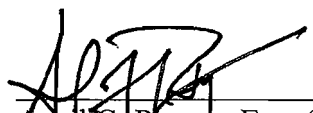
[53] *Id.* at ¶ 66.

occupancy, or surrender were never discussed by St. James and City.[54] Moreover, under the recent *Lloyd* decision, because St. James should have joined City in its suit against Frazier & Oxley, but failed to do so, its breach of contract claim is barred by res judicata.

St. James now persists in blaming City for its own deficiencies. It was required by law to inquire of Frazier & Oxley as to the legal basis for their occupancy of the mezzanine, but failed to do so. It was required by the terms of the prime lease to have any written termination agreement executed more than sixty days prior to its expiration, but it failed to do so. It was required, based upon its own representations, to deal with Frazier & Oxley after execution of the lease termination agreement, but failed to do so. Rather, it waited for more than a year, until a request was made by its lessee to execute an option to lease the mezzanine, to do anything about Frazier & Oxley's tenancy and, when it did so, it acted under a West Virginia statute as Frazier & Oxley's landlord. Its mistakes were unilateral and nothing City did constituted a breach of any provision of the lease termination agreement. Consequently, this Court should affirm the judgment of the Circuit Court of Cabell County.

CITY NATIONAL BANK OF WEST VIRGINIA

By Counsel



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[54] *Id.* at ¶ 69.

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2010, I served the foregoing BRIEF OF APPELLEE by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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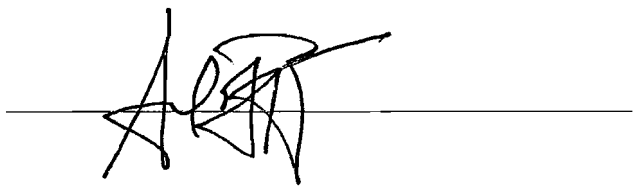

EXHIBITS

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